## Jurisdiction.

A timely motion was made by the respondents herein that this appeal be dismissed or the judgment of the Supreme Court of California be affirmed, upon the grounds stated and the authorities cited in the motion. (See Statement Opposing Jurisdiction and Motion to Dismiss or Affirm.) On October 10, 1949, the court made an order noting probable jurisdiction [Tr. 38]. Although we believe that this order may not finally determine the motion and that the court may yet grant the same, we proceed to argue the appeal upon the merits.

## Summary of Argument.

Under the first point we will show that throughout the judicial history of the United States it has universally been the settled law that the matter of devolution of property and rights of succession should be left to the legislatures of the several states; that this principle of law has been recognized and applied not only by the courts of last resort of the states but by this court in an unbroken line of decisions; that in this line of decisions is the leading case of *U. S. v. Fox*, 94 U. S. 315; a case as nearly in point as a researcher could expect to find as a parallel to the case at hand, and which has been followed on this point and cited with approval by courts of the states and by this court so often as to become the leading case on the subject.

Under the second point we will argue that although the United States as a sovereign entity may have the *capacity* to take property under a will valid in the state of its creation, there is nothing in the Constitution, either expressly or by the kind of implication heretofore recognized by this court, reposing in the United States the *right* to

take property under a will invalid under the law of the testator's domicile; that it may well be that the United States has the legal capacity to accept, but such capacity to accept must coincide with a right conferred upon the donor to make the gift; that in the absence of such a right in the donor the mere capacity to accept vests no rights and the enjoyment of such capacity is thus dependent upon the validity of the gift; that the validity of a testamentary gift must be tested by the laws, in the absence of a conflict with an express provision of the Constitution, of the state which controls the subject of the gift and not by the laws of the Federal Government which at best merely acknowledge the capacity of the legatee to receive; and that the United States was not granted by the Constitution the right or power by administrative policy to declare, nor through Congress to provide laws, validating a testamentary gift to ~~it which under the~~ law of the state of its creation is invalid.

Under the third and fourth points we will demonstrate that to now overrule *U. S. v. Fox, supra,* and the settled law built upon it as a cornerstone, as demanded by the Government, would be without reason or necessity and would strike at the heart of our dual system of government and the rights of the states under the Tenth Amendment to the Constitution; we will argue that, although the vacuum theory of absolutism of judicial construction and application of the Constitution under *stare decisis* deserves no commendation, yet we will urge not only on principle but under the cases cited that only the most cogent reasons should exist to overrule a decision of this court which has been relied upon as a precedent for many years; and that no such reason exists to now overrule *U. S. v. Fox, supra.*

## ARGUMENT.

### POINT 1.

### The Right to Regulate Testamentary Disposition of Property Is, and Always Has Been, Within the Exclusive Province of the State in Which the Property Is Located.

In approaching this phase of the argument it is well to bear in mind that there are few rules of law more firmly settled than the postulate that there is no inherent right in anyone to make a will and that the Legislature of each state may impose restrictions and limitations on the testamentary act.[1] Likewise the right to make a will is not a natural right nor a right of citizenship, nor is it a right guaranteed by the Constitution.[2] The cases cited in the note are only a few of the earlier cases upon the subject. We shall not attempt to cite herein or quote from all of the cases in the United States supporting the above statements since we feel that those cited in the note and the United States Supreme Court decisions hereinafter cited

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[1]*Wolfe v. Mueller*, 46 Colo. 335, 104 Pac. 487; *Lewark v. Dodd*, 288 Ill. 80, 123 N. E. 260; *In re Evans Estate*, 193 Iowa 1240, 188 N. W. 774; *In re Noyer Estate*, 40 Mont. 178, 105 Pac. 1013; *Matter of Delano*, 176 N. Y. 486, 48 N. E. 871; *Haldeman v. Haldeman*, 343 Ill. 550, 174 N. E. 890; *State v. Duncan*, 302 Mo. 130, 257 N. W. 784; *Porter v. Union Trust Co.*, 182 Ind. 637, 108 N. E. 117; *In re Evans Will*, 193 Iowa 1240, 188 N. W. 774; *Marett v. Broom*, 160 S. C. 91, 158 S. W. 216; *Upham v. Plankinton*, 152 Wis. 274; *Epperson v. White*, 156 Tenn. 155, 299 S. W. 812.

[2]The ownership of property does not give rise to the right to dispose of it after death. *In re Sherwood's Estate*, 122 Wash. 648, 211 Pac. 734. The right to take property by will is not a Natural right. *In re Bradbury's Estate*, 210 Iowa 1013, 231 N. W. 661; *In re Wilkinson's Estate*, 113 Cal. App. 645, 289 Pac. 1037; *White v. Howard*, 38 Conn. 342; *Jones v. Hunter*, 6 Rob. (La.) 285; *Herber's Succession*, 128 La. 111; *Hailey v. McLaurin*, 112 Mass. 705.

and quoted from will sufficiently indicate the universality of the rule that the right to make a will is a creature of statute and that it is exclusively subject to the government in whose jurisdiction the property is situated. Except for *U. S. v. Fox, supra,* these cases are cited on general principle and did not involve the precise question of whether a testamentary gift to the United States is void or valid. Argument that this general prinicple is applicable to testamentary gifts to the United States; that no constitutional question is involved in so applying it; and that where, as in the case at bar, a state statute, in the regulatory plan of its internal affairs, has chosen to except the United States as a lawful taker, no provision of the Constitution or constitutional act of Congress has been violated, is reserved to the second point in this brief.

The leading case in the United States is *U. S. v. Fox,* 94 U. S. 315, being one of the cases upon which the Supreme Court of California bottomed its decision in the instant case. This case is peculiarly applicable to the case at bar, because there was involved in that case a statute of New York, similar to Section 27 of the Probate Code of California, the statute construed by the Supreme Court of that state in the decision from which this appeal was taken. The only real distinction between the two statutes is that the New York statute dealt only with real property, whereas in the California statute no distinction is made between real and personal property. In that case as here the question was whether a will donating property to the United States was valid. In holding that under the New York statute a will to the United States was void, this court said at page 321:

> "The term 'person' as here used applies to natural persons, and also to artificial persons—bodies politic,

deriving their existence and powers from legislation—*but cannot be so extended as to include within its meaning the Federal Government. It would require an express definition to that effect, to give it a sense thus extended. And the term 'corporation' in the statute applies only to such corporations as are created under the laws of the State.* It was so held by the Court of Appeals in White v. Howard, 46 N. Y. 164, 165, and its construction of the statute is conclusive upon us. *A devise to the United States of real property situated in that state is therefore void."*[8] (Italics ours.)

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[8]"The power of the State to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, *and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted.* It is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated. *McCormick v. Sullivan,* 10 Wheat. 202. The power of the State in this respect follows from her sovereignty within her limits, as to all matters over which jurisdiction has not been expressly or by necessary implication transferred to the Federal Government. The title and modes of disposition of real property within the State, whether *inter vivos or testamentary,* are not matters placed under the control of federal authority. Such control would be foreign to the purposes for which the Federal government was created, and would seriously embarrass the landed interests of the state.

"Statutes of wills, as is justly observed by the Court of Appeals, are enabling Acts, and prior to the Statute of 32d Hen. VIII. there was no general power at common law to devise lands. The power was opposed to the feudal policy of holding lands inalienable without the consent of the lord. The English Statute of Wills became a part of the law of New York upon the adoption of her Constitution in 1777; and, with some modification of its language, remains so at this day. *Every person must, therefore, devise his lands in that State within the limitations of the statute or he cannot devise them at all. His power is bounded by its conditions."* (Italics ours.) (*U. S. v. Fox,* 94 U. S. 315.)

In holding that where one who made a pre-emptory entry died before the patent was issued, his heirs took the land after the patent issued, this court said that the disposition of immovable property,

> "whether by deed, descent or other mode is *exclusively* subject to the government within whose jurisdiction the property is situated." (Italics ours.) *Hutchinson Inv. Co. v. Caldwell*, 152 U. S. 65, 68.

In *U. S. v. Perkins*, 163 U. S. 625, the question was whether personal property bequeathed to the United States was subject to inheritance tax of New York. In holding that it was, the court said at pages 627-628—

> "the right to dispose of his property by will has always been considered purely a creature of statute and within legislative control. * * * Certainly if it be true that the right of testamentary disposition is purely statutory, the State has the right to require a contribution to the public treasury * * *"

(See also, *Plummer v. Cole*, 178 U. S. 115.)

In *James v. Habersham*, 107 U. S. 174, 179, the court said:

> "According to the uniform course of decisions of this court the validity of these devises, as against the heirs at law, depends upon the law of the State in which the lands lie, and the validity of the bequests, as against the next of kin, upon the law of the State in which the testatrix had her domicile."

(See also, *Brine v. Insurance Co.*, 96 U. S. 627.)

In *Arndt v. Griggs,* 134 U. S. 316, this court held that the duty to determine methods of determining unsettled questions respecting title to real estate is with the state and that it is not a matter of federal concern. (See also, *Hutchinson v. Caldwell, supra.*)

In *Magoun v. Ill. Trust Co.,* 170 U. S. 283, this court cited a number of decisions of this court and in construing them said that they were based upon the principles that an inheritance tax is not a tax on property but on succession and that the right to take property by devise or descent is a creature of law and not a natural right. In holding the inheritance tax involved in that case to be valid the court said at page 289, in quoting *Mager v. Grima,* 80 How. 490, 493:

> "Now, the law in questoin is nothing more than an exercise of the power which every State and sovereignty possesses, of regulating the manner and term upon which property, real and personal, within its dominion may be transmitted by last will and testament, or by inheritance; *and of prescribing who shall and who shall not be capable of taking it.*" (Italics ours.)

This court said in *Plummer v. Cole,* 178 U. S. 115, 137:

> "We think the conclusion, fairly to be drawn from the state and Federal cases, is, that the right to take property by will or descent is derived from and regulated by municipal law."

In *Kansas v. Colorado,* 206 U. S. 46, wherein this court in a case outstanding for its importance, holding that

state laws concerning the general reclamation of arid lands cannot be overridden by Congress, said at page 93:

> "It is enough for the purposes of this case that each State has full jurisdiction over the lands within its borders, including the beds of streams and other waters."

In 1944 this court said in *Demarest v. City Bank Co.*, 231 U. S. 36, 48, "Rights to succession by will are created by the state and may be limited, conditioned or abolished by it." The court in this case cited *Irving Trust Co. v. Day*, 314 U. S. 556, in which this court was asked to invalidate a statute of descent upon the ground that it impaired the obligation of a contract in violation of the Fourteenth Amendment. The statute bestowed certain rights upon a surviving spouse to elect to take property under the will or under the laws of succession. The rights thus bestowed were contrary to the terms of a document executed prior to the effective date of the statute, which document purported to be an ante-nuptial contract. In upholding the validity of the New York statute this court said at page 562:

> "The rights of succession to the property of a deceased, whether by will or by intestacy, are of statutory creation, and the dead hand rules succession only by sufferance. Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction."

*Mackie v. Story*, 93 U. S. 589; *Henderson v. Griffin*, 30 U. S. 151; and *Hood v. McGehee*, 237 U. S. 611, were cases in which this court ruled that a decision of the highest court in the state construing a state statute of wills and succession is binding upon the Supreme Court of the United States. In the latter case, at page 615, Mr. Justice Holmes succinctly put the rule as follows: "Alabama is sole mistress of the devolution of Alabama land by descent."

From the foregoing authorities there can be no doubt that, since the states have the right to regulate the testamentary act and provide to whom a testamentary disposition may be made, it was within the right of the Legislature of California to enact Section 27 of the Probate Code of that state, eliminating the United States as a proper beneficiary, unless in so doing some right granted to it by the Constitution was violated. To the thesis that no such right was granted and that the United States has no sovereign right under the Constitution to enforce a testamentary gift in the face thereof, Point 2 of this brief will be devoted.

## POINT 2.

**The Sovereignty of the United States With Respect to Testamentary Privileges Confers at Best Only the Capacity to Receive Testamentary Dispositions, and the United States Has No Sovereign Right Under the Constitution to Enforce a Testamentary Gift to It in the Face of a State Statute Prohibiting the Making of Such Gift.**

There exists in the reasoning of law, as well as logic, a basic distinction between a right to give and a right to receive. To complete a valid gift, these rights must be coexistent, for if either is lacking, the gift cannot be consummated. If the right to give is absent, the gift is void. If the right to receive is absent, the gift must fail. Thus, it follows that the right to give bestows a power to transfer upon the donor, and the right to receive invests the donee with the capacity to accept. Thus, in the case of testamentary gifts the state which controls the subject of the gift controls the right of the testator to make the gift. To determine if the donor has the right of disposition, the laws of that state must be used as a guide. To determine if the United States has the capacity to accept such a gift, the Constitution and the Acts of Congress must be used as a guide.

The recognition that the sovereign right of the United States to receive a testamentary gift is no more than a capacity is apparent from the following:

> "But the right to receive money or property, voluntarily contributed, is not a separate power, but a *capacity* belonging to the United States as a body politic and incident to the right of sovereignty—." (Italics ours.) *Dickson v. United States,* 125 Mass. 311, 313-315.

It is therefore at once evident, in view of the authorities cited under Point 1 herein, that this court has recognized without exception that in the enactment of laws such as Section 27 of the Probate Code of the State of California, the state was acting within its constitutional sphere of regulating the rights of its domiciliaries to make testamentary gifts, while the Congress, in enacting the statutes referred to in appellant's brief[4] was acting within its constitutional sphere of enunciating at most the capacity of the Treasurer of the United States and the Secretary of the Treasury to accept a gift.

Appellant in its brief, page 25, concedes that the Congress has assumed that the United States has "inherent *capacity* to receive testamentary gifts" in enacting these statutes and by enacting special legislation to deal with the receipt of bequests for designated purposes it has assumed the *"capacity* of the United States to receive the gift." (Italics ours.) Consequently it is easily understood why testamentary gifts have been accepted by the United States from testamentary donors whose domicile was in one of the many states without a statute similar to Section 27 of the California Probate Code.

In considering the sovereign rights of the United States we cannot ignore the corresponding rights of the states in all matters not bestowed upon the national government. The supremacy of the United States, as declared in the Constitution, is not all-inclusive, and "so long as the dual form of government endures, the states, it must never be forgotten, are as independent of the general government

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[4]The Act of April 3, 1945, Chap. 51, 59 Stat. 48, 31 U. S. C. 757e, and the Act of March 3, 1903, 32 Stat. 1112, 40 U. S. C. 304.

as that government within its sphere is independent of the states." *Brush v. Commissioner of Internal Revenue*, 300 U. S. 352, 364.

> "Each (government) within its own domain is supreme, and one of the chief functions of this court is to preserve the balance between them, protecting each in the powers it possesses and preventing any trespass thereon by the other." *In re Heff*, 197 U. S. 488, 505.

In concise language this court has summarized its recognition of the relativity of federal supremacy and state supremacy in *South Carolina v. U. S.*, 199 U. S. 437, 452:

> "In other words, the two governments, National and State, are each to exercise their power so as not to interfere with the free and full exercise by the other of its powers."

The Constitution authorizes both governments to exercise their authority and to the national government in its own sphere must be the preservation of the right to use the powers bestowed by the people under the Constitution and to the state government the right to use all of the rest of the original aggregate power of the people remaining after the Federal grant, each without undue influence by the other. *Educational Films Corp. v. Ward*, 282 U. S. 379.

Appellant's argument of supremacy of the United States as a sovereign under Article VI of the Constitution presupposes that that instrument has in fact granted rights, within the field in question, to the United States. Having established the distinction between the power to give and

the power to receive, we at once see that nowhere in the Constitution nor in the federal statutes is the national government given the right to regulate the testamentary devolution of property, and that therefore that right was reserved to the people and the states under the Tenth Amendment, and that where there is no conflict between the laws of the state in exercising such a reserved right and the provisions of the Constitution and Acts of Congress enacted pursuant thereto, the state and not the national government is entitled to the incidents of supremacy. *McCulloch v. Maryland,* 4 Wheat. 316.

As the court said in *Stainback v. Mo Hock Ke Lok Po,* 93 U. S. Adv. 581, 69 S. Ct. 606, 611:

> "In our dual system of government, the position of the state as sovereign over matters not ruled by the Constitution requires a deference to state legislative action * * *."

It is not suggested that the right of the state to so regulate the devolution of its property is completely unabridged by the federal Constitution in cases where it clearly appears that such a state right is limited by a clear constitutional grant of federal power to so limit. Thus, where a treaty is in conflict with a state statute (*Clark v. Allen,* 331 U. S. 503) the provisions of the treaty must be held to be supreme, but only because of the express provision of Article VI of the Constitution making such a treaty the supreme law of the land. No other instance appears in which this court has held that the Constitution in any way limits the right of a state to regulate the

testamentary disposition of property within its jurisdiction.[5] Indeed, this court in *O'Keefe v. Adams*, 314 U. S. 572, dismissed an appeal from a decision of the Supreme Court of Florida, in which appeal the validity of a Florida statute of succession, as construed by the Florida court, was challenged as being repugnant to the equal protection clause of the Fourteenth Amendment. The appeal was dismissed by this court, citing *U. S. v. Fox, supra*, for want of a substantial federal question.

As hereinafter pointed out, the sovereign power of the United States has frequently been invoked, in the absence of an express constitutional grant of such power, to enable the national government to perform some function as incidental and reasonably necessary to an express power. However we know of no instance in which such sovereign power has been recognized unless the exercise of that power had been attempted by the Congress in enacting legislation incidental to and reasonably necessary for the complete function of constitutional government. Nowhere in the Constitution is the United States given such sovereign power, as an incident to which exists the necessity to regulate the making of testamentary gifts. Nor has Congress enacted any legislation attempting to so regulate. Indeed such Congressional action, if attempted,

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[5]In *Maxwell v. Bugbee*, 250 U. S. 525, 541, this court said:

"It has been uniformly held that the Fourteenth Amendment does not deprive the States of the right to determine the limitations and restrictions upon the right to inherit property, but, 'at most can only be held to restrain such an exercise of power as would exclude the conception of judgment and discretion, and which would be so obviously arbitrary and unreasonable as to be beyond the pale of governmental authority.'"

would itself be in violation of the Tenth Amendment, as an invasion of powers reserved to the states.

Recognizing the dual nature of our government and the supremacy of both the national and state governments in their respective spheres, it is submitted that the sovereignty of the United States does not extend to the right to regulate testamentary devolution of property by enforcing a gift to it, in the face of a statute, limiting the right of the testator, enacted by a state within its constitutional sphere of supremacy. Nor has Congress, in its enactments, attempted to validate a gift which is void under the laws of a state.

This cannot be argued to be an infringement upon the sovereignty of the Federal government. There are many situations in which rights, interests and legal relations of the United States are determined by application of state law. *Penn Dairies, Inc. v. Milk Control Commission of Pennsylvania,* 318 U. S. 261. As this court said in *United States v. Standard Oil Co.,* 332 U. S. 301, 308:

> "The Government, for instance, may place itself in a position where its rights necessarily are determinable by state law, as when it purchases real estate from one whose title is invalid by that law in relation to another's claim. *Cf. United States v. Fox,* 94 U. S. 315."

Nor could Congress extend the constitutional sphere of the national government for expediency, or for moral or political purposes, or for any other reason, into the realm of state sovereignty. In *Linder v. United States,* 268 U. S. 517, this court accepted

> "as established the doctrine that any provision of an Act of Congress ostensibly enacted under power

granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power, but solely to the achievement of something plainly reserved to the states, is invalid and cannot be enforced".

Thus the mere fact that the United States may be deprived of a source of revenue is no justification for an invasion of the states' sovereign sphere, when there is no constitutional right to that revenue. In that connection it must be remembered that the right of the state to control its property is based in part on the natural and just desire for self preservation, which desire is respected and contemplated by the Constitution,[6] and to add this source of revenue to the United States would be to deny to the state its revenue through *ad valorem* taxes thereon.

The sovereignty of the United States with respect to testamentary gifts being limited to the capacity to receive such gifts, such sovereignty cannot be constitutionally extended into the sphere of state sovereignty to force the consummation of such a gift in disregard of a state statute declaring such a gift void as being beyond the right of the testator to make.

A contrary conclusion would require not only the repudiation of *United States v. Fox*, 94 U. S. 315, but an unprecedented invasion into the rights reserved to the states as discussed in Point 3 hereof.

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[6]"The preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." *Texas v. White*, 7 Wall. 700, 725. Accord: *Brush v. Commissioner of Internal Revenue*, 300 U. S. 352.

## POINT 3.

**The Contention That the Doctrine of U. S. v. Fox Should Be Repudiated Is to Disregard the Rights Reserved to the States Under the Tenth Amendment.**

That *U. S. v. Fox, supra,* is controlling in this case is beyond doubt. To hold for the government would be to repudiate and expressly overrule it. The appellant in its brief (App. Br. p. 33), in referring to that case, says, "While that case undoubtedly supports the holding of the court below, at least so far as real property is concerned, we submit that it must be overruled." Why? The Constitution of the United States is the same today as it was at the time of *U. S. v. Fox, supra,* with the exception of the Amendments thereto which have been passed since that time. The basic principles which it pronounced have not changed, nor has anything occurred since that time to require a construction not then given to it insofar as concerns the right of the United States to receive a testamentary gift as against Section 27 of the California Probate Code, as interpreted by the Supreme Court of the State of California in the instant case. As will be hereinafter more fully pointed out in Point 4 of this brief, *Clark v. Allen,* 331 U. S. 503; *Oyama v. California,* 332 U. S. 633; and *Shelley v. Kraemer,* 334 U. S. 1, relied upon by the appellant (App. Br. p. 34), fall far short as authority for the proposition that a testamentary gift bad at the time of *U. S. v. Fox* is now good. In view of the issues raised on this appeal we commend to the court a

review of *U. S. v. Fox, supra,* and the principles which it announced. In determining whether to give ear to the demand of the appellant that it be overruled, we ask that the court consider the often repeated postulate that although this court should review its former decisions and overrule them when they are erroneous, it should do so with great care. *U. S. v. Fox, supra,* has been cited with approval by state courts and by this court in a multitude of cases, not cases involving the precise question of the valadity of a testamentary gift to the United States, but cases relying upon the general principle of the decision. The latest of these is *U. S. v. Standard Oil,* 332 U. S. 301. The court, at page 308, cited *U. S. v. Fox* for the statement, "The Government, for instance, may place itself in a position where its rights necessarily are determinable by state law, as when it purchases real estate from one whose title is invalid by that law in relation to another's claim." Another recent case by this court which cited *U. S. v. Fox, supra,* with approval is *U. S. v. Mine Workers,* 330 U. S. 258. There the court said, at page 275, "The act does not define 'persons.' In common usage that term does not include sovereign, and statutes employing it will ordinarily not be construed to do so." *Irving Trust Co. v. Day,* 314 U. S. 556, was a case involving a state statute alleged to violate the contract clause of the Constitution. The court said at page 562 that "Rights of succession to the property of a deceased, whether by will or by intestacy, are of statutory creation and the dead hand rules succession only by sufferance. Nothing in the Federal Constitution forbids the legislature of a state to limit, condition or even abolish the power of testamentary disposition over property within its jurisdiction. * * * *U. S. v. Fox,* 94

U. S. 315." In the note[7] are some of the many other cases in which *U. S. v. Fox, supra,* has been cited by this court with approval.

In effect, the appellant is asking that this court overrule *U. S. v. Fox, supra,* and declare a right in the government which has never heretofore been recognized, on the basis of a hypothetical sovereignty existing separate and apart from the Constitution. This thesis is directly contrary to the view of this court expressed in *Kansas v. Colorado,* 206 U. S. 46, 88: "Yet while so construed (meaning the Constitution) it still is true that no independent and unmentioned power passes to the National Government. * * *" Federal sovereignty exists only within the realm of the constitutional grant of powers, limited to those powers expressly granted and those incidental powers reasonably necessary to carry the expressed powers into execution. As pointed out elsewhere in this brief, no right to take by or to regulate the making of wills was delegated to the United States expressly, nor has the government shown what expressly delegated power needs be implemented by its right to deprive the states of their exclusive prerogative to say who may or may not take by will. To overrule *U. S. v. Fox, supra,* and reverse the Supreme Court of California in the instant cases would, we respectfully submit, engraft upon the law a new doctrine of implied powers of the Federal Government.

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[7]*U. S. v. Cooper Corp.*, 312 U. S. 600, holding "person does not include sovereign." *Plummer v. Cole*, 178 U. S. 115; *Magoun v. Ill. Tr. Bank*, 170 U. S. 283; *U. S. v. Perkins*, 163 U. S. 625; *Hutchinson v. Caldwell*, 152 U. S. 65; *Arndt v. Griggs*, 134 U. S. 316; *Langdon v. Sherwood*, 124 U. S. 74; *Jones v. Habersham*, 107 U. S. 174; *Brine v. Ins. Co.*, 96 U. S. 627.

## POINT 4.

### The Argument of Appellant Is Unsound and Suggests Untenable Application of Constitutional Concepts, Leading to an Unconstitutional Result.

The argument of appellant under its Point I seems to be based upon this syllogism: That where an attempted exercise of power to limit the testamentary act collides with the Federal Constitution, the states' power must give way; that Section 27 of the California Probate Code, as interpreted by the Supreme Court of that state, does collide with a constitutional power belonging to the United States; therefore Section 27 is void insofar as it affects the United States. The difficulty with this logic is that one of the terms is based upon an untrue and unproved premise, leading, of course, to an erroneous conclusion. The untrue and unproved premise in this line of reasoning is that Section 27 does collide with a constitutional power belonging to the United States. We have heretofore pointed out in this brief that at no place in the Constitution was the United States granted the right to claim constitutional power to take by will as against a state statute prohibiting it. We do not contend that the reserved right of states to control devolution of property is absolute and unlimited under all circumstances and conditions. Hence, we find no fault with the cases cited by appellant in support of its erroneous conclusion. We do, however, contend that they are not controlling in the case at bar, and now proceed to point out their inapplicability.

*Clark v. Allen*, 331 U. S. 503, involved a statute prohibiting gifts of real and personal property to a German alien in violation of a *treaty* between the United States

and Germany. That the right to make treaties with foreign powers was one of the rights granted to the Federal Government and that its right in this field is supreme, is implicit in the Constitution.[8] Thus, *any* state statute operating to interfere with the treaty making power or with an existing treaty is in violation of the Constitution. Clearly no treaty is involved in the instant case. In citing and relying upon *Clark v. Allen, supra,* appellant has placed itself in an incongruous position, for the reason that, as authority, that case weighs heavily in support of our position. It was held in that case that the treaty involved covered real property and not personal property and that thus the statute involved violated the treaty as to real, but not as to personal property. The case recognizes the principle contended for throughout this brief. At pages 517 this court said:

> "Rights to succession to property are determined by local law. See *Lyeth v. Hoey,* 305 U. S. 188, 193; *Irving Trust Co. v. Day,* 314 U. S. 556, 562. Those rights may be affected by an overriding federal policy, as where a treaty makes different or conflicting arrangements. *Hauestein v. Lynham, supra.* There the state powers must give way. *Ex. Hines v. Davidowitz,* 312 U. S. 52. *But here there is no treaty governing the right to succession of the personal property*" (Italics ours.)

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[8]Article II, Section 2, The Constitution of the United States: "He (the President) shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the senators present concur." Article VI, The Constitution of the United States: "This Constitution, and the laws of the United States *which shall be made in pursuance thereof;* and all *treaties* made or which shall be made, under authority of the United States, shall be the supreme law of the land." (Italics ours.)

*Oyama v. California*, 332 U. S. 633, cited by appellant, was a case involving the rights of a *citizen* under the Fourteenth Amendment. The case holds that a statute of California, forbidding aliens ineligible for citizenship to own or acquire agricultural land violated the Fourteenth Amendment, as a deprivation of equal protection of the California laws and his rights as an American citizen. That the rights given under the Fourteenth Amendment were intended to protect only *individuals* as to the matters therein prohibited is clear from the contemporaneous exposition as well as the judicial history of the Constitution. (See The Constitution of the United States, compiled in the Legislative Reference Service, Library of Congress, pp. 765, *et seq.*) So far as we can find, it has never been urged that the United States is a *citizen* or *person* under the Fourteenth Amendment.

*Shelley v. Kraemer*, 334 U. S. 1, is equally inappropriate for the same reason as pointed out above. In that case this court held that race restrictive covenants were in violation of the equal protection clause. We have been unable to find any case holding that the Federal Government is entitled to the same constitutional protection of equality as are persons. None are cited by appellant, and, in view of the careful differentiation in the Constitution of rights and privileges of the Federal Government, the states, citizens, and persons, we believe that none exist. The Government is not a "person," and the "ordinary dignities of speech" rule excluded it as such in an action for treble damages under the Sherman Act. *U. S. v. Cooper Corp.*, 313 U. S. 604. (See also, *Davis v. Pringle*, 268 U. S. 315, and *U. S. v. Mine Workers, supra.*)

The appellant attempts to make capital of the words "overriding federal policy," used in *Clark v. Allen, supra*

(App. Br. p. 19), in its comment on the *Irving Trust Co.* case. We submit that the court in *Clark v. Allen* in using the word "policy," was referring to the policies of the Constitution, and meant that the "state policy must give way" only where it comes in conflict with rights or powers under the Constitution, as distinguished from general federal policies designed by departments or agencies of the government.

Point II of appellant's brief, when reduced to an hypothesis, is that as an incendence of sovereignty it has the right to receive testamentary gifts; hence Section 27 of the California Probate Code violates the supremacy clause. Like the argument set forth in appellant's first point, the conclusion is erroneous because the premise cannot be proved. In Point 2 of this brief we have shown the difference between a right and a capacity. We do not quarrel with the thesis that the United States may receive testamentary gifts from citizens of states whose legislatures have not seen fit to pass laws similar to Section 27 of the California Probate Code. We do, however, deny that the capacity to do so arises to the dignity of an absolute right, as against a statute which, under the rights reserved to the states, prohibits it. Emphasis is placed by appellant (App. Br. p. 73) upon *Dickson v. U. S.*, 125 Mass. 311. This case cannot be helpful in the case at bar, because the State of Massachusetts had no law similar to Section 27 of the California Probate Code. However, as hereinbefore pointed out, that case recognized a distinction between a right to take and a capacity to receive. For the most part, the cases cited by appellant in its brief in support of the premise that the United States has a constitutional right to take by will, are cases wherein

rights of the United States have been extended by implication to include such rights as are reasonably necessary to carry into effect the expressed powers. These involved the necessity of eminent domain, to enter into contracts, to take security for debts, and to sue in its own name. In these cases and many others where power of the Federal Government had been implied in order to carry the expressed powers into effect, there has been some reasonable nexus of necessity between the expressed power and that sought to be implied. It would be a challenge to ingenuity to attempt to provide such nexus between *any* expressed power in the Constitution and the right of the Government to force the consummation of a testamentary gift which is void under the laws of the state of its creation, and we note a paucity of any such attempt in appellant's brief. If the Government needed any of the real property in The Sanborn Estate for any federal purpose, it could take it under its power of eminent domain. *Kohl v. U. S.*, 191 U. S. 367. That the necessity for the taking by the Government of money or other personal property by will does not exist, is implicit in the constitutional plan for the raising of revenue. Article One, Section 8 of the Constitution provides: "The Congress shall have the power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense." If the government is arguing that it is necessary for it to take by will in order to raise revenue, this is an abvious absurdity and should require no further argument in rebuttal.

Appellant, in B-1 of its second point (App. Br. p. 27), introduces its argument with the statement, "It is clear from the foregoing that the United States has the right to receive testamentary gifts and that that right flows

from its sovereignty created by the Constitution." It then goes on to argue that to deny it this right offends the Supremacy Clause. Again the appellant has fallen into error by assuming an unproved and erroneous premise, *i. e.*, that the United States has the *right under the Constitution* to receive testamentary gifts. Its conclusion that the Supremacy Clause is violated thus fails for invalidity.

We submit that *U. S. v. Snyder*, 149 U. S. 210, *U. S. v. Alleghany County*, 322 U. S. 174, and the cases cited on page 32 of appellant's brief and the argument thereunder ignore the issue in this case. That a lien of the government is effective against property of an estate, being entitled to priority over state liens, or that debts due to the Government are entitled to priority, whether due from a decedent's estate or opposed by a state's claim for taxes, the propositions for which some of these cases stand, is neither controlling nor helpful. These cases for the most part involved Congressional statutes, all passed under constitutional powers of Congress. As was held in *State of Michigan v. U. S.*, 317 U. S. 338, 340, cited by appellant (App. Br. p. 32), "The establishment of a tax lien by Congress is an exercise of its constitutional power 'to lay and collect taxes,' Article 1, Section 8 of the Constitution." We have attempted to make it clear in this brief that we do not question the supremacy of any constitutional law of Congress. We do, however, question the validity of the use of cases properly recognizing supremacy of constitutionally granted federal powers as authority for the application of the Supremacy Clause to a case where the Tenth Amendment and not Article VI of the Constitution is involved. The case of *Terral v. Burke*

*Construction Co.*, 257 U. S. 529, cited by appellant (App. Br. p. 36), is a case of that kind, *i. e.*, one in which the state was denied the right to refuse a foreign corporation access to the federal courts in violation of Article III of the Constitution.

In Point III of appellant's brief (App. Br. p. 37) it is contended that Section 27 of the Probate Code of California, as construed by the Supreme Court of that state, discriminates against the United States. We believe that this Point and the argument thereunder add nothing to the other points raised by appellant in its brief, and that it has been adequately answered in the foregoing pages of this brief. It again assumes a false premise, *i. e.*, that the Federal Government has a *constitutional* right to receive a testamentary gift as against a state statute prohibiting it. Certainly there can be no right in a state to discriminate against rights arising under the Constitution, but we have shown that no constitutional right exists in the Federal Government to receive or enforce a testamentary gift to it prohibited by a state statute. If the right to determine who may take by will is with the states as a part of their reserved rights, as we believe we have shown, how can it be said that discrimination against the United States could arise out of the exercise of such right, in the absence of any constitutional right in the United States to take by will in the face of a state statute declaring the gift void. The decisions of the Supreme Court cited by appellant on this point (App. Br. p. 40) are for the most part cases where remedial state laws were

an obstacle to the enforcement or full enjoyment of some federal law constitutionally enacted to carry out a constitutional power. The distinction between such cases and the case at bar is thus clearly apparent.

In appellant's brief, *Snyder v. Bettman,* 190 U. S. 249, is cited numerous times as authority for appellant's position. (App. Br. pp. 9-18-36-37.) On pages 9 and 18 it is cited as authority for the proposition that the Constitution governs the devolution of property, and thus the United States by virtue of its constitutional sovereignty has superior rights in that field to the rights of the states. The quotation from the case by appellant (App. Br. pp. 9-18) eliminates certain words and supplies another so that the inference which appellant desires is naturally reached. However, the true and complete quotation clearly sets forth that the court in that case assumed that under our dual system of government it is the statutory right of the state to regulate the descent of property.[9] It is interesting to note that this case cites *U. S. v. Perkins, Plummer v. Coles, Knowlton v. Moore* and *Magoun v. Illinois Trust Co.,* all cited *supra,* in support of our contention herein.

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[9]"This case must be regarded as definitely establishing the doctrine that the power to tax inheritances does not arise solely from the power to regulate the descent of property, but from the general authority to impose taxes upon all property within the jurisdiction of the taxing power. It has usually happened that the power has been exercised by the same government which regulates the succession to the property taxed; but this power is not destroyed by the dual character of our government, *or by the fact that, under our Constitution, the devolution of property is determined by the laws of the several states.*" (Italics ours.) *Snyder v. Bettman,* 1948 U. S. 249, 252.

## Conclusion.

The right to regulate succession to property, including the right to say to whom a testamentary gift may be made, was not granted to the Federal Government, but was reserved to the states and to the people by the Tenth Amendment to the Constitution; that where, as in the case at bar, that right has been exercised by a state through its Legislature, it is controlling, unless in the exercise thereof it conflicts with a right or power expressed in the Constitution, or a right or power reasonably necessary to carry into effect one of the expressed rights or powers; that there is no right or power granted to the United States by the Constitution to enforce a testamentary gift to it and that none can be implied as necessary to carry into effect any expressed power; that, therefore, Section 27 of the California Probate Code prohibiting testamentary dispositions to the United States is a valid exercise of that state's constitutional power and that to contend for its invalidity is to contend for an unconstitutional result.

It is respectfully submitted that the decision of the Supreme Court of California herein should be affirmed.

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